

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Implementation of Section 26)
of the Cable Television Consumer)
Protection and Competition Act)
of 1992)
Inquiry Into Sports Programming)
Migration)

PP Docket No. 93-21

EX PARTE OR LATE FILED

SUPPLEMENTAL FURTHER COMMENTS OF
THE NATIONAL BASKETBALL ASSOCIATION,
THE NATIONAL FOOTBALL LEAGUE,
THE NATIONAL HOCKEY LEAGUE, AND
THE OFFICE OF THE COMMISSIONER OF BASEBALL

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The National Basketball Association ("NBA"), the National Football League ("NFL"), the National Hockey League ("NHL"), and the Office of the Commissioner of Baseball ("OCB") submit these supplemental comments in response to the Commission's Further Notice of Inquiry. These supplemental comments address an argument, advanced by the Association of Independent Television Stations, Inc. ("INTV"), that sports siphoning rules would not violate the First Amendment. See INTV Comments at 38-43; INTV Reply Comments at 49-54.^{1/}

^{1/} These supplemental comments do not address the very substantial arguments that make clear that anti-siphoning rules are not justified on the merits. Those arguments are set forth in the Comments and Reply Comments submitted by each of the undersigned parties.

I. INTRODUCTION AND SUMMARY

INTV's discussion of the First Amendment issue rests on a superficial analysis that seriously understates the constitutional difficulties that would be posed by a sports siphoning rule. INTV simply ignores the likelihood that a siphoning rule applicable only to sports programming would be viewed by the courts as a content-based restriction on speech, and therefore be deemed presumptively unconstitutional. See R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992). Moreover, even if the courts were to apply the less demanding standard of United States v. O'Brien, 391 U.S. 367 (1968), there is a substantial probability that a sports siphoning rule would be held to violate the First Amendment.

INTV does not (and could not reasonably) dispute that a sports siphoning rule would raise serious First Amendment concerns. It is now well-settled that cable television "is engaged in 'speech' under the First Amendment." Leathers v. Medlock, 499 U.S. 439, 444 (1991), and the same is true of other non-broadcast media such as satellite carriers and wireless cable operators. The activities of such speakers, including the selection of "programs to include in [their] repertoire," "plainly implicate First Amendment interests." City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986).

As INTV acknowledges (Comments at 38), the "leading case" on this subject invalidated siphoning regulations on First

Amendment grounds. Home Box Office, Inc. v. FCC, 567 F.2d 9, 43-51 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). INTV's efforts to distinguish the HBO case (see INTV Comments at 38-42 and INTV Reply Comments at 50-54) are wholly unpersuasive. Indeed, INTV's demand that the Commission institute siphoning regulations limited to sports programming would raise additional First Amendment concerns that were not present in HBO and that would make the courts even more likely to invalidate such regulations as "content-based" restrictions on speech.

II. SIPHONING RULES THAT APPLIED ONLY TO SPORTS PROGRAMMING WOULD LIKELY BE SUBJECT TO STRICT SCRUTINY UNDER THE FIRST AMENDMENT

INTV contends that the HBO court invalidated the prior siphoning rules because they "encompassed almost every type of entertainment from feature films to series programming." INTV Comments 39. INTV urges the Commission to adopt siphoning rules "dealing exclusively with sporting events," and asserts that such rules would pass constitutional muster. Id. In fact, siphoning rules that applied expressly and uniquely to sports programming would present an even more serious First Amendment problem than the siphoning rules invalidated in HBO.^{2/}

^{2/} INTV's comments discuss very few First Amendment cases, and simply ignore the many cases that apply "strict scrutiny" to content-based regulations of speech.

A. A Sports Siphoning Rule Would Likely Be Considered A Presumptively Invalid Content-Based Regulation of Speech

The Supreme Court has held repeatedly that "[c]ontent-based regulations are presumptively invalid" under the First Amendment. R.A.V. v. City of St. Paul, 112 S. Ct. at 2542; see Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 112 S. Ct. 501, 508 (1991); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989); Boos v. Barry, 485 U.S. 312, 319-21 (1988). INTV's First Amendment analysis rests entirely on the unarticulated -- and incorrect -- assumption that sports siphoning rules are content-neutral and therefore subject to judicial review under the less demanding standard of United States v. O'Brien, 391 U.S. 367 (1968). There are at least three interrelated reasons why a sports siphoning rule would likely be considered a content-based regulation of speech subject to strict scrutiny.

First, a sports siphoning rule would prohibit cable operators from showing sports programs that they otherwise would include in their programming. Indeed, this is precisely the effect such a rule is intended to have. By prohibiting speech that the speaker would otherwise make, the rule "necessarily alters the content of the speech." Riley v. National Federation of the Blind, 487 U.S. 781, 795 (1988). The Supreme Court held in Riley that a regulation that altered the content of speech (by mandating rather than prohibiting speech) was "content-based" and violative of the First Amendment. Id. at 795.

Second, because INTV's proposed siphoning rule would specifically target sports programs, it would almost certainly be viewed as being premised upon a "subject-matter" distinction. In Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980), the Supreme Court held unconstitutional a regulation prohibiting public utility companies from including in monthly electric bills any inserts discussing political matters. The Court reasoned that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." Id. at 537. A sports siphoning rule would necessarily draw a distinction based on the subject-matter of the program. Moreover, the "narrow exceptions to the general prohibition against subject-matter distinctions" would be inapplicable to a sports siphoning rule because such a rule would not address a situation in which a speaker is seeking "a right of access to public facilities" to communicate its views. Id. at 539. See pp. 7-11 infra.

Third, the Supreme Court has held that "government may impose reasonable restrictions on the time, place or manner of engaging in protected speech provided that they are adequately justified 'without reference to the content of the regulated speech.'" City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1516 (1993) (quoting Ward v. Rock Against Racism, Inc., 491 U.S. 781, 791 (1989)). Even in the unlikely event that a sports siphoning rule could be considered a "time, place

or manner" restriction, it would be difficult to justify the rule without reference to the content of the regulated programs -- e.g., reference to the desirability of sports programs and the purported need for keeping such programming on broadcast television. See INTV Comments at 40 (siphoning regulations would be justified based on purported evidence that siphoning is a threat to "regularly viewed, popular sporting events").

Nor is it likely that a court would allow such regulations to be justified on grounds such as "safeguard[ing] the public interest in free television." INTV Comments at 42. A similar argument failed to persuade the Court in Discovery Network. The city there attempted to prohibit from city streets newsracks that distribute "commercial" publications. The Court rejected the city's asserted justifications -- safety and aesthetics -- and instead found the ban content-based and unconstitutional. Indeed, the Court held that the city's "mens rea" in enacting the ban was irrelevant because "[u]nder the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack." Id. at 1516 (emphasis supplied). Similarly, whether a particular program would fall within INTV's anti-siphoning regulations would depend on the content of the program (i.e., whether it was a "sports" event or not).^{3/}

^{3/} An additional reason why sports siphoning regulations would likely be found constitutionally suspect is that they favor a particular category of speaker -- local television broadcasters -- over operators of nonbroadcast systems. There
(continued...)

B. A Sports Siphoning Rule Could Not Survive Strict Scrutiny

If sports siphoning regulations were subject to strict scrutiny, a court would almost certainly hold that they violate the First Amendment. A regulation subject to strict scrutiny is presumptively unconstitutional and will not be sustained unless it is "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Simon & Schuster, 112 S. Ct. at 509 (quoting Arkansas Writers' Project v. Ragland, 481 U.S. 221, 230 (1987)). For the reasons explained below (pp. 9-14), a sports siphoning rule is unlikely to survive scrutiny under the O'Brien standard, let alone the more demanding strict scrutiny test. As a leading scholar has noted, constitutional scrutiny that is "'strict' in theory" is "fatal in fact." Gerald Gunther, Foreward: In Search of Evolving Doctrine on a

^{3/}(...continued)

can be no question that siphoning rules would explicitly "favor[] certain classes of speakers over others." HBO, 567 F.2d at 48. When presented with regulations that had similar effects, the Supreme Court has subjected them to strict scrutiny. In Riley, the Court invalidated a law that, by imposing a percentage limitation on charitable fundraising expenses, placed "a restriction on . . . charities' ability to speak." 487 U.S. at 794. And in Buckley v. Valeo, 424 U.S. 1, 17 (1976), the Court invalidated a limitation on independent campaign expenditures designed to equalize voters' influence by "restricting the voices of people and interest groups who have money to spend." The Court observed that the "concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49. INTV's proposed siphoning rule not only addresses a non-existent problem, but would also run afoul of the First Amendment for the same reason as the restrictions in Riley and Buckley.

Changing Court: A Model for Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). Two recent Supreme Court decisions illustrate that strict scrutiny in First Amendment cases is almost invariably "fatal in fact."

In R.A.V., the Court invalidated an ordinance that made it a misdemeanor to "place[] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika" that "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 112 S. Ct. at 2541. The Court accepted the state court's ruling that the ordinance applied only to fighting words -- a category of speech that is not entitled to any First Amendment protection. See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942). The Court nevertheless held that government prohibition even of unprotected and proscribable speech must not be based on the content of the speech. See 112 S. Ct. at 2545.

In Simon & Schuster, the Court invalidated New York's "Son of Sam" statute, which required that income derived by a convicted or admitted criminal from works describing the crime be deposited in an escrow account and made available to victims of the crime and the criminal's creditors. Despite the sympathetic facts of the case, the Court held that any law that "imposes a financial burden on speakers because of the content

of their speech" is "presumptively inconsistent with the First Amendment." 112 S. Ct. at 508.

III. SIPHONING RULES WOULD LIKELY VIOLATE THE FIRST AMENDMENT EVEN IF JUDGED UNDER THE O'BRIEN STANDARD

INTV's discussion of the First Amendment issue proceeds on the assumption that siphoning rules would be subject to the less demanding standard announced in United States v. O'Brien, 391 U.S. 367 (1968). As explained above, the courts probably would treat a sports siphoning rule as a content-based regulation subject to strict scrutiny. The O'Brien test was developed to review a statute that "on its face deal[t] with conduct having no connection with speech" and that had only an "incidental" effect of limiting symbolic speech. 391 U.S. at 375-76. A sports siphoning rule would necessarily be connected with speech, and its restrictions on speech would plainly be more than "incidental." See Texas v. Johnson, 491 U.S. 397, 403 (1989) (O'Brien applies only to regulations directed at "noncommunicative conduct" and "not related to expression"). Consequently, it is unlikely that the courts would apply O'Brien to sports siphoning rules.^{4/}

^{4/} Although the D.C. Circuit applied the O'Brien standard in HBO, the siphoning rules invalidated in that case did not single out programs based on their content. Moreover, more recent D.C. Circuit decisions have expressed "serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech" to regulations of cable television. Quincy TV, Inc. v. FCC, 768 F.2d 1434, 1453 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

Even if the courts were to apply the less stringent O'Brien test, it is likely that they would reach the same result as the D.C. Circuit in HBO. Under O'Brien, a "government regulation is sufficiently justified if it is [i] within the constitutional power of the Government; [ii] if it furthers an important or substantial governmental interest; [iii] if the governmental interest is unrelated to the suppression of free expression; and [iv] if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest." 391 U.S. at 377. A sports siphoning rule is likely to fail three of the four parts of the O'Brien test.

First, the administrative record in this proceeding will not support the conclusion that a siphoning rule would further a substantial government interest. It is well-settled that "the mere abstract assertion of a substantial governmental interest, standing alone," will not satisfy the constitutional requirement. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1454 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986); see also Century Communications Corp. v. FCC, 835 F.2d 292, 304 (D.C. Cir. 1987), clarified, 837 F.2d 517, cert. denied, 486 U.S. 1032 (1988). Instead, "when trenching on first amendment interests, even incidentally," 835 F.2d at 304, the government must produce "a record that convincingly shows a problem to exist." Quincy, 768 F.2d at 1455 (quoting HBO, 567 F.2d at 50). The agency bears a "heavy burden of justification." 768 F.2d at 1457. In

HBO itself, the court cautioned that "[w]here the First Amendment is concerned, creation of . . . a rebuttable presumption of siphoning without clear record support is simply impermissible." 567 F.2d at 51; cf. Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993) (government's burden in commercial speech case "is not satisfied by mere speculation or conjecture").

The record in this proceeding does not provide any support (let alone the clear support required under O'Brien) for the conclusion that sports migration is a genuine problem. The Commission's Interim Report concluded that "NFL and college basketball games have not migrated to cable television and are in little danger of doing so," and that "migration of NBA, MLB and NHL games has not taken place at the national level," and "local migration has been isolated and relatively slight." Interim Report, ¶ 86, at 39. See also Further Notice of Inquiry ¶ 4, at 2 (Interim Report found that increase in the number of sports events shown on cable is not associated with a decline in broadcasts of sporting events, and broadcast exposure has increased in some cases.) The administrative record compiled as a result of the Commission's Further Notice of Inquiry confirms that conclusion.^{5/}

INTV points to "the exponential growth of cable" as a fact that would justify a sports siphoning regulation. INTV

^{5/} The record reveals that virtually every major sport which has entered into new carriage agreements since the issuance of the Interim Report has continued or expanded its commitment to broadcast television. See generally Further Reply Comments of Affiliated Regional Communications, Ltd. at 4-24.

Comments 40. But the relevant constitutional inquiry is not the size of cable; instead, it is whether sports migration is a serious problem of substantial governmental interest. Similarly, INTV's extreme assertion (Comments at 41) that "all events will be forced, through simple economics, to go to cable" is belied by the record. If INTV's assertion (id. at 40) that cable has a "dominating impact on the marketplace" were correct, the massive sports migration that it predicts would already have occurred. But the evidence compiled by the Commission shows that this has not happened.^{6/}

Second, sports siphoning rules might well be "related to the suppression of free expression." Siphoning rules necessarily would be related to speech, and would suppress speech by restricting the amount of sports programming available on cable television. Moreover, it is entirely possible that any increase in sports programming on broadcast television would not offset the decrease in cable programming.

^{6/} Nor is it at all clear that preventing "sports migration" is itself a substantial or important government interest. As formulated by INTV, the "public interest" in sports migration is grounded in the notion that "all events should be made available to as many people as possible." INTV Reply Comments at 52. Not only is this "interest" extraordinarily vague and virtually unbounded, but, given the concededly limited programming capacity of local broadcast stations, it could well be optimized only through extensive use of alternative media. And given the economics of program production, making programming available on a subscription basis may increase total output and distribution. See Noll, Peck and McGowan, Economic Aspects of Television Regulation, ch.2 (1973). The same is, of course, true of exclusive distribution arrangements. See Syndicated Exclusivity Report and Order, 3 FCC Rcd 5299 at ¶¶ 56-59 (1988).

Third, it would be difficult if not impossible to fashion sports siphoning rules that would pass the "narrow tailoring" test. That requirement is satisfied only if the regulation does not "burden substantially more speech than is necessary to further the government's legitimate interest." Ward, 491 U.S. at 799. In HBO, the court cautioned that siphoning rules

must be closely tailored to the end to be achieved so that material not broadcast (because it is unsuitable or unsalable) is readily available to cablecasters. Otherwise the rules will curtail the flow of programming to those served by cable and willing to pay for it, with a consequent loss of diversity and unnecessary restriction of the First Amendment rights of producers, cablecasters, and viewers.

567 F.2d at 50. The record in this proceeding demonstrates that there has been no migration at all in some sports, and that any migration that has occurred is isolated and relatively slight. Consequently, a "broad prophylactic rule" would violate the First Amendment. See Riley, 487 U.S. at 801 (citation omitted). Instead, the Commission would be required to tailor any siphoning rule to particular sports and particular local markets. The difficulties entailed in drafting such a regulation, defending it in the courts, administering it, and updating it to reflect constantly changing conditions, would present virtually insuperable complications for the Commission.

**IV. SPORTS SIPHONING REGULATIONS WOULD RAISE FAR MORE
SERIOUS CONSTITUTIONAL CONCERNS THAN RESTRICTIONS
ENACTED IN THE 1992 CABLE ACT**

It is worth noting that INTV's proposal for sports siphoning regulations would be far more constitutionally troubling than most of the restrictions enacted by Congress in the 1992 Cable Act and currently subject to First Amendment challenge. For the most part, those restrictions do not prohibit cable operators from engaging in any particular speech, but merely require them to provide access to certain other speakers.

For example, the "must-carry" rules contained in Sections 4 and 5 of the Cable Act (47 U.S.C. §§ 534 and 535) require cable operators to provide carriage to local commercial broadcasters (Section 4) and to local educational stations (Section 5). Central to the reasoning of the three-judge District Court that sustained these rules against a First Amendment challenge was the conclusion that "the must-carry provisions appear to be unrelated to the content of the expression they will affect." Turner Broadcasting System, Inc. v. FCC, 819 F. Supp. 32, 43 (D.D.C. 1993).^{2/} That conclusion

^{2/} The District Court's judgment on the must-carry rules is currently under appeal in the Supreme Court, Turner Broadcasting System, Inc. v. FCC, No. 93-44 (argued Jan. 12, 1994), and a decision is expected by the first week of July. If the Supreme Court were to reverse the District Court in whole or in part, then sports siphoning regulations would almost certainly be held unconstitutional. As the argument in text demonstrates, a sports siphoning rule is likely to violate the First Amendment even if the Supreme Court upholds the constitutionality of the must-carry rules at issue in Turner.

was based on the District Court's finding that the must-carry rules do not "impose any burden on operators or programmers on the basis of the messages they . . . propose to transmit." Id. at 42. See also Brief for United States at 38, Turner Broadcasting System, Inc. v. FCC, No. 93-44 (U.S. argued Jan. 12, 1994) (must-carry rules do not "single out any topic that cable operators may or may not discuss"). The rules essentially "mandat[e] carriage of 'local' broadcasters' signals" and, in enacting the rules, Congress was not concerned with the "subject-matter" of local broadcasters' programming. 819 F. Supp at 44.^{8/}

Furthermore, because the must-carry rules merely require cable operators to grant access to other speakers, they could be justified under PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), in which the Court sustained a requirement that shopping center owners to grant access for speech-related activities. See Turner, 819 F. Supp. at 42; United States' Brief at 15, 45. Like the shopping center owner in PruneYard, a cable operator under the must-carry rules would not be "affected to any degree in his ability to speak his own piece." 819 F. Supp. at 42; see also Pacific Gas & Electric Co. v.

^{8/} The District Court in Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C. 1993), reached similar conclusions concerning cable provisions governing access for public, educational and governmental programming (47 U.S.C. § 531), leased access (47 U.S.C. § 532), and rate regulation (Section 3 of the 1992 Act). These were found not to be content-based because the government was not telling the cable operators "what can or cannot be said." Id. at 4.

Public Utilities Comm'n of California, 475 U.S. 1, 12 (1986) (state law in Pruneyard did not "affect the shopping center owner's exercise of his own right to speak"); id. at 24 (Marshall, J, concurring in the judgment) ("While the shopping center owner in Pruneyard wished to be free of unwanted expression, he nowhere alleged that his own expression was hindered in the slightest").

None of this would hold true for sports siphoning regulations. They could not be justified under PruneYard because they would directly affect the ability of cable operators and sports programmers "to speak [their] piece." Indeed, rather than providing access to alternative delivery systems, siphoning regulations would restrict or deny the ability of sports programmers and similar entities to obtain carriage on such systems. PruneYard would also be inapplicable because siphoning regulations would not be "unrelated to content of the expression they affect" -- their effect would depend on the content of the expression. They would single out a topic (sports programming), and would impose a regulatory burden (if not an outright prohibition) if cable operators and others proposed to transmit messages on that topic. The regulations could not be found to be unconcerned with subject-matter because they would single out the subject-matter of the regulated speech -- sports programming.

The provision of the 1992 Cable Act that is most analogous to INTV's proposed sports siphoning rule is Section

15, which imposes special regulations governing premium channels, i.e., pay channels that "offer[] movies rated by the Motion Picture Association of America as X, NC-17, or R," 47 U.S.C. § 544(d)(3)(B). That provision was held to violate the First Amendment in Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 9-10 (D.D.C. 1993). Noting that even the government had to "concede as much," the district judge in Daniels, who wrote the majority opinion in Turner sustaining the must-carry rules, had no difficulty in concluding that Section 15's regulation was "content-based." Id. at 9 & n.14. The court easily found that the regulations did not survive strict scrutiny even though the regulation -- which required cable operators to provide notice to viewers 30 days in advance of any free showing of a "premium channel" -- at most made carriage of the premium channels somewhat "less practicable and more costly." Id. at 9. Given that such a fate befell Congress's attempt to impose regulation specifically on "premium channel" entertainment, it is highly likely that similar difficulties would meet a regulation of "sports" entertainment. Indeed, it is more so, as the regulatory burden contemplated by sports siphoning regulations is far greater than the relatively mild notice requirement in Section 15.

* * * * *

For the foregoing reasons, the NBA, the NFL, the NHL, and the OCB respectfully submit that any sports siphoning regulation would present very serious First Amendment questions, and that the Commission should reject INTV's assertions to the contrary.

Respectfully submitted,

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